COLLECTIVE REDUNDANCY CONSULTATIONS – BACKWARD AND FORWARD

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A new recommendation to the European Court of Justice has the potential to complicate collective redundancy consultations.

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Where an employer proposes large scale redundancies of 20 or more employees within a period of 90 days or less (the reference period), it must consult on its proposal with representatives of the affected employees and notify the Department for Business, Energy and Industrial Strategy. The duty to collectively consult is triggered even if the intention to declare redundancies is provisional and the exact roles at risk have not been identified. Failure to collectively consult could render any subsequent dismissals unfair and/or result in protective awards of compensation of up to 90 days gross pay being made in favour of each of the affected employees – potentially a significant amount. These provisions are derived from the European Commission and incorporated into English law.

The reference period has been taken to mean a period of 90 consecutive days which contains the greatest number of redundancy dismissals proposed by the employer. The employer must therefore project forward and if it is apparent that the proposed redundancies might claim 20 or more employees over any 90-day period then the collective consultation obligations are triggered.

A recent recommendation by the Advocate General of the European Court of Justice (ECJ) on a Spanish case (*UQ v Marclean Technologies*) could complicate how this 90-day reference period is calculated.

In this case the employee brought a claim for unfair dismissal, arguing that her dismissal was part of a "covert" collective redundancy scheme. She claimed that between 31 May and 14 August 2018, seven people had ceased working for Marclean, in addition to a further 29 people on 15 August 2018. The Spanish court was unsure whether dismissals taking place after the employee's dismissal should be considered to determine whether collective redundancies had taken place.

The Advocate General recommended that the 90-day period is a “rolling period”. The consequence is that employers are required to look both backwards and forwards over 90 days to determine whether the threshold number of redundancies is met over that period. If the employee was dismissed within a consecutive 90-day period, calculated backwards or forwards, and the total number of redundancies within that period reaches the required threshold of 20 or more, the obligation to consult collectively will have been triggered.

It is likely that the ECJ will adopt the opinion of the Advocate General. This is unfortunate as the decision shows no regard for the practicalities of employers having to engage in collective redundancies.

"It might also be advisable to collectively consult when fewer than 20 redundancies are envisaged, and the employer cannot be certain that further redundancies will not be required within a 90-day period."

Employers making fewer than 20 people at a time redundant will need to check they do not inadvertently cross the threshold number of redundancies over a 90-day period, thus triggering collective consultation obligations in relation to all of the redundancies within that period (some of which may already have been concluded). That means looking back as well as forward to count the total number of redundancies. Without proper planning it is easy to envisage a situation where an employer makes 19 redundancies over a 90-day period only to suddenly realise it has to make one more. With that additional redundancy the collective consultation obligations for the previous redundancies will have been triggered and unless collective consultation took place with those redundancies there will be a risk of incurring liabilities for protective awards based on failure to collectively consult.

We therefore recommend caution and careful forward planning when redundancies are planned. It might also be advisable to collectively consult when fewer than 20 redundancies are envisaged, and the employer cannot be certain that further redundancies will not be required within a 90-day period.

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